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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

**In re Angel H., a Person Coming Under
the Juvenile Court Law.**

**ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,**

Plaintiff and Respondent,

v.

A.H.,

Defendant and Appellant.

A122983, A123435

**(Alameda County
Super. Ct. No. HJ07006814)**

In these consolidated appeals, the mother of Angel H. appeals from an order denying her petition under Welfare and Institutions Code section 388 and from an ensuing order terminating her parental rights (Welf. & Inst. Code, § 366.26).¹ The mother contends both orders must be reversed because, she urges, the juvenile court failed to apply the correct legal standard and abused its discretion in denying the section 388 petition. We will affirm the orders.

¹ All further statutory references are to the Welfare and Institutions Code.

I. FACTS AND PROCEDURAL HISTORY

In May 2007, the Alameda County Social Services Agency (Agency) filed a petition on behalf of minor Angel and a sibling, pursuant to section 300, subdivisions (b), (g), and (j).²

A. *Jurisdictional Hearing*

The Agency's report for the jurisdictional hearing recommended that Angel be adjudged a dependent of the juvenile court and that the mother be provided reunification services. The social worker reported that, on the day Angel was born, the mother tested positive for methamphetamines but Angel tested negative. The mother had a serious drug problem, had limited parenting skills, was homeless, and lacked resources to meet Angel's needs. Angel had been placed temporarily in foster care.

At the jurisdictional hearing in May 2007, the mother submitted the matter to the juvenile court. The court found the petition's allegations to be true and accepted the Agency's recommendations, removing Angel from the mother's care.

B. *Six Month Review*

The Agency's report for the six-month review indicated that Angel remained in foster care. The mother had made only minimal progress on her case plan. She attended just five of nine scheduled visits with Angel, denied needing an inpatient substance abuse treatment program, and did not participate in any substance abuse services. She did not follow through on referrals, and she failed to participate in drug court. The social worker advised that the mother still needed to address her substance abuse issues, secure a reliable source of income, and obtain housing. Meanwhile, an adoption assessment determined that Angel was adoptable. The Agency recommended that the mother's reunification services be terminated.

² Because the initials of appellant mother and the minor are identical, we refer to the appellant as "mother" and the minor as "Angel." In our summary of the facts and procedural history, we omit matters pertaining to Angel's sibling and her father, which are not at issue in the appeal.

At a contested six-month review hearing on December 18, 2007, the mother appeared with counsel and testified. The court found her case plan compliance to be minimal, terminated reunification services, and set a hearing under section 366.26.

C. Mother's Section 388 Petition

On April 1, 2008, the mother filed a request under section 388 to change the December 18, 2007 order that had terminated services and set the section 366.26 hearing. The mother requested that Angel be returned to her custody and that the family be granted family maintenance services.

The mother alleged that circumstances had changed since the December 18 order. She had obtained a full time job, obtained safe housing, quit smoking cigarettes, and continued to abstain from drug use. Her drug and alcohol counselor reported that the mother had "a lot of knowledge" about, and showed great interest in learning more about, the 12 steps, relapse prevention tools and related matters. According to the counselor, the mother had an excellent attitude toward recovery, she participated in counseling and drug and alcohol testing, and all of her drug test results were negative.

The mother also contended that return of Angel to her custody would be in Angel's best interest because she had consistently visited with Angel, she loves her, and she wants to be a good parent.

The court set the mother's section 388 petition for a contested evidentiary hearing on the day set for the section 366.26 hearing. Ultimately the section 388 petition was heard first, and the section 366.26 hearing was continued.

D. Hearing on Mother's Section 388 Petition

The hearing on the mother's section 388 petition began on August 1, 2008. The mother appeared with counsel. The court admitted documentary evidence including the mother's section 388 petition, the Agency's section 366.26 reports, and a psychological evaluation that the mother had submitted to the juvenile court.

According to the psychological evaluation, the mother had been very cooperative and answered all of the evaluator's questions openly and honestly. Her cooperation was

“of interest” to the evaluator, because during an earlier psychological assessment she was irritable and uncooperative. According to the evaluator, the mother had clearly made progress in her cognitive, psychological, and emotional states, as well as her daily functioning, and she had the capacity to become a fully functioning and productive adult and parent. However, the psychological evaluator also recorded the mother’s desire not to have custody of Angel until some later time. The mother stated: “for right now they [her children] are in a good place. I’m working on getting my life back so I can have a better life for them.” She added: “I couldn’t handle the children financially right now. I just want to be able to get my life together first. I’m hoping the judge will let me. I want them back right now, but I am not ready, I’m barely managing financially.”

At the section 388 hearing, the mother testified that Angel had never been in her care, and that for three months after Angel was removed from her home she consumed “more drugs” instead of working on her case plan. She began working on the case plan in November 2007, and the last time she used illegal drugs was around November 3, 2007. By December 2007, she was attending outpatient classes and a drug and alcohol recovery program, she did not miss any drug tests, she never tested positive for drugs, and she attended all required classes. In addition, she had been working 36-40 hours per week since February 1, 2008, and was training to be an assistant manager. She was paying child support and lived in a one-bedroom apartment with her boyfriend.

The mother noted that during visits with Angel, Angel recognized her and was becoming more attached to her. She acknowledged, however, that Angel did not mind when the visits were over. The mother believed Angel was somewhat bonded with her, but not as closely bonded as Angel was with her foster parent. The mother asserted that she loved her children, she had grown up a lot, and was a completely different person than she had been before.

On cross-examination, the mother was asked if she was prepared to have Angel back with her “right this minute.” She replied: “No. I would like – if I were to get her back, I wouldn’t do that to her. I would want it to be a slow transition because she is

bonded with [the foster parent], so I wouldn't just take her away from [the foster parent] like that. I would want it to be a very slow transition."

On August 22, 2008, the court denied the mother's petition. The court found "that there has been a change in circumstances, a very good change in circumstances, since the last order was made in this matter. That the mother really has turned many things in her life around that are very positive and very good." However, the court was not sure that the substance abuse problem underlying the dependency had been totally resolved, since the mother had not been sober for very long. In addition, the court found that, as indicated in the Agency's section 366.26 report, Angel "has a very, very close relationship with the de facto parent [foster parent] in this case and that the mother, in fact, in her testimony made clear that she wished she had that same type of relationship with [Angel]." The court continued: "So the conclusion I've reached is that at this time it is not in the best interest of [Angel] for me to grant the 388 motion. . . . [Angel] has been with the de facto parent [foster parent] for her life and I can't avoid that fact and I wish – the mother actually indicated in testimony that she really wasn't ready to have [Angel] placed with her right now, requested more of a gradual transition, but there comes a time under the law that we have to focus on permanency and that's where we're at and so I am going to deny the mother's 388 request . . ."

The mother appealed the denial of her section 388 petition on October 17, 2008 (appeal number A122983).

E. Section 366.26 Reports

Meanwhile, the Agency filed reports for the section 366.26 hearing. In its report filed on April 1, 2008, the Agency advised that Angel was comfortable with her mother but did not appear to have close bonds with her. Their relationship had not moved past the "friendly visitor" stage. By contrast, Angel had been living with her foster parent since she was approximately one week old and related to her as a primary parent figure, and there was a close parent-child bond between them. The foster parent had met all of Angel's physical, emotional, developmental and social needs. According to the social

worker, the foster parent was friendly, outgoing, responsible, supportive, confident, compassionate, calm, happy, fun, assertive and active. The foster parent had an approved home study and wanted to adopt Angel. The Agency recommended adoption as the permanent plan.

The social worker filed an additional report for the section 366.26 hearing on July 18, 2008, again recommending adoption as the permanent plan. A section 366.26 report filed on October 8, 2008, likewise reiterated the Agency's recommendation of adoption. The social worker advised that there had been no discernible progress in the relationship between Angel and her mother since the Agency's last report. Angel responded to the foster parent as a primary parental figure, and her relationship with her mother had "not evolved into more than that of a 'friendly visitor.'"

F. Section 366.26 Hearing

The section 366.26 hearing was held on October 20, 2008. The mother appeared with counsel. The Agency's section 366.26 reports were admitted into evidence, and judicial notice was taken of the section 388 proceeding and all prior findings, orders and judgments.

The mother submitted the matter, as her counsel announced that "we've come up with . . . some agreements regarding post[-]adoption" and would be requesting "mediation between the prospective adoptive parent and the mother" regarding *post*-adoption matters. The mother's attorney told the court that the mother had "worked very hard to alleviate what brought her here in the first place and she's done a fantastic job . . ., but [the mother] also knows, and she's said this to me many times and we've talked about this extensively, that [Angel] is bonded to her foster parent and because she loves her daughter, *she does not want to stand in the way of [Angel] having her permanency.*" (Italics added.)

The juvenile court scheduled mediation for the mother and the foster parent and terminated the mother's parental rights. The court added: "I do want to make a comment that the mother's decision today is certainly, I am assuming, a bittersweet one and a brave

one and I hope the post adoption agreement can be reached that maintains contact between the mother and [Angel]. But I think the mother's decision is in the best interest of [Angel] and that's what the focus is for this Court."

On December 8, 2008, the mother nonetheless appealed the order terminating her parental rights (appeal number A123435).

We consolidated appeal numbers A122983 and A123435.

II. DISCUSSION

In appeal number A122983 from the denial of her section 388 petition, the mother contends the juvenile court failed to apply the correct legal standard and abused its discretion in denying the petition. In appeal number A123435, she contends the order terminating her parental rights must be reversed because of the erroneous denial of her section 388 petition. Her arguments are meritless.³

A. Denial of Section 388 Petition

1. The Court Did Not Apply an Incorrect Legal Standard

Section 388 provides that a party may "upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court" (§ 388, subd. (a).) Section 388 thus provides for modification of prior juvenile court orders when the moving party presents new evidence or a change of circumstances *and* demonstrates that modification of the previous order would be in the child's best interests. (*In re*

³ The Agency contends that the mother's appeal from the order terminating her parental rights is barred by waiver, because she conceded the termination of her parental rights at the section 366.26 hearing. The Agency further contends that the mother's appeal from the order denying her section 388 petition is: (1) moot, because her appeal from the order terminating parental rights is barred by waiver; (2) unappealable, because reversal would require reversal of the section 366.26 setting order and writ review was not sought (see *Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068); and (3) barred by waiver, because she retracted her requests for A.H. to be returned to her custody and for family maintenance services. Without deciding these issues, we resolve the matter on the merits.

Kimberly F. (1997) 56 Cal.App.4th 519, 532; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415. Cal. Rules of Court, rule 5.570(a), (h).)

In making this determination, the juvenile court considers the seriousness of the problem that led to the dependency, the reason it has not been overcome, the ease with which the problem may be removed or ameliorated, the degree to which it has, the relative strength of the bond between the dependent child with the parent and her bond with the caretaker, and the length of time the child has been in the system. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Angel argues that the juvenile court applied the wrong legal standard, because it based its decision solely on the bond between Angel and the foster parent. Angel is incorrect.

In the first place, the juvenile court referred to the correct legal standard when it made its decision. The court noted the two issues on a section 388 petition, explaining that the mother had the burden of proof to show both that circumstances had changed and that it would be in Angel's best interests to change the prior order. After finding a change of circumstances, the court discussed the considerations involved in determining the child's best interests, including factors referenced in *In re Aaliyah R.*: the problem leading to the dependency, the degree to which it had been resolved, the *relative* strength of the bonds Angel had with the mother and with her foster parent, and the length of time Angel had been in the system. Thus, the juvenile court plainly did *not* assert that the legal standard for deciding the section 388 petition was simply the bond between Angel and the foster parent.

Furthermore, the juvenile court did not base its denial of the mother's section 388 petition solely on the bond between Angel and the foster parent. To the contrary, the court expressly analyzed several relevant factors. It asserted that the best interests determination on a section 388 petition includes consideration of "the seriousness of the problem that led to the dependency in the first place and the reasons for any continuance of this problem" and "the degree to which the problem leading to the dependency may be

easily removed or ameliorated or lessened and the degree to which it actually has been.” It then addressed those factors by finding: “[M]om seems to have made great progress in the problem that brought [Angel] into this court. Not sure if it’s been totally taken care of yet. It hasn’t been all that long.” The court next considered “the strength of the existing bond and relationship between the parent and child and between the child and her present caretaker and the length of time a child has been in the dependency system in relation to the parental bond.” In this regard, the court observed the “very close relationship” between Angel and the foster parent *and* the fact that the mother “wished she had that type of relationship” with Angel. Implicit in this observation is not only that the foster parent had a strong bond with Angel, but that the bond between them was much stronger than the bond between Angel and the mother. Further, the court noted the mother’s unwillingness to assume immediately the custody she had requested in her petition: “the mother actually indicated in testimony that she really wasn’t ready to have [Angel] placed with her right now, requested more of a gradual transition, but there comes a time under the law that we have to focus on permanency and that’s where we’re at and so I am going to deny the mother’s 388 request for the reasons that I’ve stated.”

The court did not decide section 388 petition using the wrong legal standard.

2. The Juvenile Court Did Not Abuse Its Discretion

As mentioned, factors to consider in determining the child’s best interests in a section 388 context focus on the extent to which the problem leading to the dependency had been resolved (including the seriousness of the problem, the reason for its continuation, and the difficulty of removing or ameliorating it), and the relative strength of the parent-child and child-caretaker bonds and the length of time the child has been in the dependency system. (*In re Aaliyah R.*, *supra*, 136 Cal.App.4th at pp. 446-447.) We review the juvenile court’s determination for an abuse of discretion. (*Id.* at p. 447.)

Ample evidence supported the juvenile court’s findings on the relevant factors. As to the problem underlying Angel’s dependency, the mother had used methamphetamine and marijuana for years, including while she was pregnant with Angel,

and she tested positive for methamphetamine on the day Angel was born. Her substance abuse was serious, leading to arrests and criminal convictions. The reason her substance abuse problem continued was her lack of cooperation with treatment. Although she more recently participated in treatment and drug-tested negative for a few months before the section 388 hearing, it was not unreasonable for the juvenile court to be cautious in viewing the extent to which the underlying problem had really been resolved. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 43, 48-49; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.)

As to bonding and the child's length of time in the system, Angel had never been in the mother's care. Their relationship had not even developed past the friendly-visitor stage. By contrast, Angel has lived with the foster parent since she was two days old, the foster parent is the only parent Angel has ever known, and there is a close and functional parent-child bond between them. The foster parent has met all of Angel's physical, emotional, developmental and social needs, and she wants to adopt her. The mother acknowledged the stronger bond with the foster parent and how harmful it would be if Angel were taken away from the foster parent at the time of the section 388 hearing.

Indeed, the mother testified that she was *not* ready to have Angel returned to her custody. Her psychological evaluation also recorded her acknowledgement that she "couldn't handle the children financially right now" and wanted to "be able to get [her] life together first." "A [section 388] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.*, *supra*, 70 CalApp.4th at p. 47.)

We, like the juvenile court, recognize the significant strides the record suggests the mother has made, and we consider her efforts to be laudable. She has not established, however, that the juvenile court erred in denying her section 388 petition.

B. Termination of Parental Rights

The mother argues that the order terminating her parental rights should be reversed because the juvenile court erred in denying her section 388 petition. Because she has not established error in the denial of the section 388 petition, she has not demonstrated that the order terminating parental rights must be reversed either.

III. DISPOSITION

The orders are affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.*

* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.